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Docket No: RPC 506PUS  
Serial No.: 09/626,517  
APPEAL BRIEF

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Gerald R. Koefeldt et al.

Group Art Unit: 3727

Serial No.: 09/626,517

Examiner: Joe Merek

Filed: July 27, 2000

Title: Bottle Crate

Attorney Docket No.: RPC 0506 PUS

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**SUBSTITUTE APPEAL BRIEF**

**Introduction**

Applicant submits this Substitute Appeal Brief in response to the notice of non-compliance mailed May 7, 2003.

Applicant has added references to pages and line numbers of the specification in the Summary of the Invention section of the brief.

The Examiner has noted that there is no assignment in the application. The assignment of this application has been recorded at Reel/Frame 011206/0270.

Applicant's previous brief did argue all of the claims for all of the rejections, but Applicant has clarified the Argument section to change the arguments that were relevant to "all of the claims" to specifically list the independent claims in which the relevant language can be found.

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**CERTIFICATE OF MAIL**

I hereby certify that the enclosed Substitute Appeal Brief (in triplicate) is being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on June 9, 2003.

Konstantine J. Diamond

Applicant has revised the Grouping of the claims to remove the statement that certain independent claims are independently patentable of their dependent claims. The Grouping itself is still proper, since the dependent claims are patentable independently of the independent claims. Specifically, the Examiner objected to the statement that Claims 1, 12, 28 and 29 are patentable independently of other groups over the Apps '819 reference. Applicant has deleted that statement, but notes that the other groups are still patentable independently of the first group. Further, the Examiner also objected to the statement that Claims 1 and 12 are patentable independently of other groups over the Rehrig "Splash Crate" reference. Applicant has deleted that statement, but notes that the other groups are still patentable independently of the first group.

#### **Real Party In Interest**

The real party in interest is Rehrig Pacific Company, the Assignee of the entire right and interest in this application by way of the assignment recorded at Reel/Frame 011206/0270.

#### **Related Appeals and Interferences**

There are no related appeals and interferences.

#### **Status of the Claims**

Claims 1-23 and 25-29 are finally rejected and appealed.

#### **Status of Amendments**

Appellant filed an "Amendment With Appeal" in association with the original Appeal Brief on February 18, 2003. The Examiner did not indicate whether this amendment has been entered. A copy of the amendment is attached to this brief after the Claim Appendix.

The amendment is made to correct a typographical error, so that dependent claim 13 is shown to depend from independent claim 12, instead of dependent claim 11. Thus, Appellant anticipates that the "Amendment With Appeal" will be entered in a timely manner. However, the Claim Appendix will not reflect the substance of the "Amendment With Appeal" until it is officially entered.

### **Summary of the Invention**

This invention relates to a bottle crate. Generally, beverage bottles are loaded into crates, which are then palletized. Crates in successive layers are stacked on top of each other, with the bottles bearing most of the load of the above-stacked crates. These bulk pallets are then typically stored in a warehouse for shipping to retailers. [page 1, lines 5-10]

One recent advance in the distribution area is a use of a product handling device known as the Tygard Claw® manufactured by Tygard Machine and Manufacturing Company. The Tygard Claw can be installed to the front or the side of a conventional fork lift carriage, and enables a distributor to pick from a bulk pallet of product one layer at a time. Briefly, the Tygard Claw is a large clamping device with four individual walls that approach a layer of product on a pallet squarely and uniformly by each wall moving toward and away from a pallet layer in a translating motion. The actuators for the walls are equipped so that the walls are touch sensitive in order to lift the product without damage. These clamping devices such as the Tygard Claw enables distributors to assemble shipments of product without the need to manually pick and move layers of product. [page 1, lines 11-22]

In many cases, depending on the particular crate and its contents, the crate may be deformed to a point where the beverage containers loaded in the crate contact each other. Crates under these conditions may eventually fail due to the repeated stress, deflection, and deformation. [page 1, lines 23-26]

The present invention provides an improved crate for bottles that is able to work efficiently with automated handling devices. The improved crate is more durable and subject to less deflection and deformation because it has corner areas that are adapted to better withstand the stresses placed on such crates. [page 2, lines 9-14]

Referring to Figure 1 of the application, the improved nestable crate 10 for bottles includes a floor member 12 and first and second pairs of opposed sidewalls 14, 16 integrally formed with the floor member 12. Each sidewall 14, 16 includes a side band member 22, 24, which is defined by an upper edge 26, 28 and a lower edge 30, 32. The lower edge 30, 32 is spaced above the floor member 12 by a predetermined distance to define a sidewall nesting area therebelow. The upper and lower edges are each contoured downwardly to form a corner band portion 38 having a corner upper edge and corner lower edge. Each nesting area matingly receives a corresponding side band member of a crate nested subjacent thereto. [page 2, line 20 to page 3, line 2]

In one embodiment, the sidewall 13, 16 includes a plurality of projection members 40 that extend upwardly above the upper edges of each band member and are received within corresponding openings formed in the lower edge when nested below a similar crate. The crate according to the present invention may also include a corner projection member 66 that extends upwardly from the upper surface of the corner wall portion and is received within a corresponding corner opening formed in the corner lower edge when nested below a similar crate. [page 3, lines 3-9]

### **Issues**

The final rejection of claims 1-23 and 25-29 as anticipated by Apps (US DES 378,249) is improper.

The final rejection of claims 1, 2, 4-12, 14-20, 23 and 25-29 as anticipated by Apps (US 5,060,819) is improper.

The final rejection of claims 1, 2, 6-10, 12, 16-20, 23, 25 and 26 as anticipated by Rehrig "Splash Crate" is improper.

### **Grouping of Claims**

The rejection of claims 1-23 and 25- 29 is contested. Claims 1-23 and 25-29 do not stand or fall together.

For purposes of this appeal only and based upon the underlying rejections being appealed, Appellant groups the claims as follows:

For the rejection over Apps '249:

Claims 1, 20 and 29 stand or fall together, but are patentable independently of the other groups. That is, the rejection of these claims does not stand or fall with the other groups.

Claims 12 and 28 stand or fall together, but are patentable independently of the other groups. That is, the rejection of these claims does not stand or fall with the other groups.

Claims 3, 13 and 21 stand or fall together, but are patentable independently of the other groups. That is, the rejection of these claims does not stand or fall with the other groups.

For the rejection over Apps '819:

Claims 1, 12, 28 and 29 stand or fall together.

Claims 4, 14 and 20 stand or fall together, but are patentable independently of the other groups. That is, the rejection of these claims does not stand or fall with the other groups.

Claims 9, 18 and 25 stand or fall together, but are patentable independently of the other groups. That is, the rejection of these claims does not stand or fall with the other groups.

For the rejection over the Rehrig "Splash Crate":

Claims 1 and 12 stand or fall together.

Claims 9, 18 and 25 stand or fall together, but are patentable independently of the other groups. That is, the rejection of these claims does not stand or fall with the other groups.

Claim 20 is independently patentable. That is, the rejection of claim 20 does not stand or fall with the other groups.

## Argument

### Apps '249

The Examiner has rejected claims 1-23 and 25-29 as anticipated by Apps (US DES 378,249). Independent claims 1, 12, 20, 28 and 29 call generally for a lower edge of a side band member to define a sidewall nesting area which "receives a corresponding side band member of a crate nested subjacent thereto." Recognizing that the "sidewall logo" portion alone of the sidewall of the '249 patent is not matingly received in the sidewall nesting area, the Examiner asserts that the "sidewall logo" *together with the pylons* of the '249 patent constitute Applicants' claimed "side band member."

Although the Examiner is permitted to interpret the claims broadly, the Examiner's interpretation must still be reasonable and must be the "plain meaning" unless the Applicant has provided a clear definition in the specification.<sup>1</sup> Here, the Examiner's interpretation of the claim term "side band member" is contrary to the ordinary meaning. One of ordinary skill in the art would call just the sidewall logo, not the sidewall logo plus the pylons, of the '249 patent a "band"

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<sup>1</sup> MPEP 2111.01; *In re Zletz*, 893 F2d 319, 321 (Fed. Cir. 1989).

or “side band member.” The pylons of the ‘249 patent are not part of the band, but are separate projections from the band, using the ordinary meaning. In the present application, the sidewall 14, 16 includes a side band member 22, 24 from which raised projections 40 extend. Thus, consistent with the ordinary meaning, the term “side band member” as used in the present application does not include the projections.

As the Examiner recognizes, when the “bottle case” disclosed in the ‘249 patent receives a subjacent bottle case, the area below the “sidewall logo” portion will not receive a corresponding “sidewall logo” portion. Instead, the area below the “sidewall logo” of the ‘249 patent will receive only the pylons projecting upwardly from the “sidewall logo” portion. Since, as explained above, the pylons of the ‘249 patent are not part of the “side band member,” the “side band member” is not received in the “sidewall nesting area” as required by all of the claims.

Claims 1, 20 and 29 further clarify that the “side band member” is “matingly” received in the “sidewall nesting area.” This further specifies contact between the side band members, which is not present in the ‘249 patent. For this additional reason, claims 1, 20 and 29 are independently patentable.

Additionally, the upper and lower edges of the sidewall logos in the ‘249 are contoured upwardly, not downwardly, at one end of the case (to the left of Figure 2 of the ‘249 patent). Claims 12 and 28 further specify that the corner band portions (implicitly requiring *all* of the band corner portions) each have an upper edge that is below the plane of the upper edge at the side band portions. Again, the sidewall logos are contoured upwardly at the left end of Figure 2 of the ‘249 patent and the corners are not below the plane of the side band portions. Therefore, for these additional reasons, claims 12 and 28 are independently patentable.

Claims 3, 13 and 21 each specify that each sidewall includes a plurality of projection members extending upwardly from the upper edges of each band member. Applicant agrees that the pylons extend from the upper edges of each band member. But since that is the case, then the pylons are not part of the band member as Applicant argued above with respect to the independent claims. Since the Examiner argues that the pylons “extend upwardly from the upper edges of each band member,” he cannot also define the pylons as part of the “side band member.” For this reason, Applicant again urges that the independent claims are patentable. In the alternative, at least Claims 3, 13 and 21 are independently patentable.

**Apps '819**

The Examiner has rejected claims 1, 2, 4-12, 14-20, 23 and 25-29 as anticipated by Apps (US 5,060,819).

The Examiner must be including the extension portions 110 as part of the "side band" in all of the claims. As explained above, this is contrary to the ordinary definition of the term "band," which would not include the projections. Therefore, claims 1, 12, 20, 28 and 29, which include the term "band," are properly allowable.

The Examiner has not explained his rejection based upon this reference or specified the embodiment to which he refers. The failure to specify a particular embodiment may have led the Examiner into error. For example, it appears that the Examiner may be relying on the embodiment in Figure 22 of the '819 patent to reject claim 1, while relying on a different embodiment, shown in Figure 1, to find only the additional elements of claim 4, which depends from claim 1. Of course, this is improper. Claim 4 specifies a corner projection, which Applicant assumes the Examiner finds as the extensions located in the corners of the Figure 1 embodiment of the '819 patent. However, if this is the case, then the Figure 1 embodiment does not include "upper and lower edges each having a contour directed downwardly to form a corner band portion," as claimed. Claims 14 and 20 also specify the corner projection member and are therefore patentable for this reason as well. Clearly, no embodiment in the '819 patent shows both sidewalls contoured downwardly to form a corner band portion and the corner projection member. Therefore, Claims 4, 14 and 20 are independently patentable.

Claims 9, 18 and 25 specify that the sidewalls have a double-wall construction. None of the walls in the '819 patent have double-wall construction. Therefore, claims 9, 18 and 25 are independently patentable.

**Rehrig "Splash Crate"**

The Examiner has rejected claims 1, 2, 6-10, 12, 16-20, 23, 25 and 26 as anticipated by the Rehrig "Splash Crate."

The Examiner is including the pylons as part of the "side band" in all of the claims. As explained above, this is contrary to the ordinary definition of the term "band," which would not include the pylons. Therefore, claims 1, 12, 20, 28 and 29 are properly allowable over this reference.

Claims 9, 18 and 25 specify that the sidewalls have a double-wall construction. None of the walls in the Splash Crate have double-wall construction. Therefore, claims 9, 18 and 25 are independently patentable.

The Splash Crate clearly does not include a corner projection member extending upward from a corner band portion, as required by claim 20. Therefore, claim 20 is independently patentable.

### CONCLUSION

For the above reasons, all of the pending claims should be allowed. Applicant has previously submitted a check in the amount of \$320 for the Appeal Brief Fee with the original Appeal Brief. If any additional fees are due or extensions of time required please charge all fees to Deposit Account No. 50-1984.

Respectfully submitted,



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## CLAIM APPENDIX

1. A crate for bottles comprising:  
a floor member; and  
first and second pairs of opposed sidewalls integrally formed with the floor member, each sidewall including a side band member defined by an upper edge and lower edge, the lower edge spaced above the floor member by a predetermined distance to define a sidewall nesting area therebelow, the upper and lower edges each having a contour directed downwardly to form a corner band portion having a corner upper edge and corner lower edge, wherein each nesting area matingly receives a corresponding side band member of a crate nested subjacent thereto.
2. The crate of claim 1 wherein the contour is directed downwardly in the plane of its respective sidewall.
3. The crate of claim 1, wherein each sidewall further includes a plurality of projection members extending upwardly from the upper edges of each band member and received within corresponding openings formed in the lower edge when nested below a similar crate.
4. The crate of claim 1, further comprising a corner projection member extending upward from a corner upper surface and received within a corresponding corner opening formed in a corner lower surface when nested below a similar crate.
5. The crate of claim 4, wherein the upper surface of the sidewall projections and corner wall projections are substantially co-planar.
6. The crate of claim 1, wherein at least one of the first and second pairs of opposed sidewalls includes a pair of diagonally opposed members extending upwardly therefrom for preventing crate misuse.

7. The crate of claim 1, wherein at least one of the first and second pairs of opposed sidewalls includes an opening for providing visibility into the crate.

8. The crate of claim 1, wherein at least one of the first and second pairs of opposed sidewalls includes a handle member for handling the crate.

9. The crate of claim 1, wherein the first and second pairs of opposed sidewalls have a double-wall construction.

10. The crate of claim 1, wherein the first and second pairs of opposed sidewalls have an outer portion defined by the band member, and an inner surface integrally attached to the floor member.

11. The crate of claim 1, wherein the upper and lower edges have a wave-like contour.

12. A crate for bottles comprising:  
a base; and

a sidewall structure extending upwardly from the base and attached thereto, the sidewall structure including a continuous band member having a pair of opposed side band portions, a pair of opposed end band portions, and corner band portions disposed between each adjacent side band portion and end band portion, the band member defined by an upper edge and lower edge, wherein the lower edge at the side band portions and end band portions is spaced above the base a predetermined distance to define a corresponding nesting area therebelow for receiving the corresponding side band portion and end band portion when in a nesting orientation with a similar crate, the upper edge at the side band portions and end band portions being directed downwardly such that the upper edge at the corner band portion is disposed below the plane of the upper edge at the side band portions and end band portions in order to define a corner pocket above the corner portion upper edge.

13. The crate of claim 11, wherein the sidewall structure further includes a plurality of projection members extending upwardly from the upper edges of the band member and received within corresponding openings formed in the lower edge when nested below a similar crate.

14. The crate of claim 12, further comprising a corner projection member extending upward from a corner band upper surface and received within a corresponding corner opening formed in a corner lower surface when nested below a similar crate.

15. The crate of claim 14, wherein the upper surface of the sidewall projections and corner projections are substantially co-planar.

16. The crate of claim 12, wherein the sidewall structure includes an opening for providing visibility into the crate.

17. The crate of claim 12, wherein the sidewall structure includes a handle member for handling the crate.

18. The crate of claim 12, wherein the first and second pairs of opposed sidewalls have a double-wall construction.

19. The crate of claim 12, wherein the first and second pairs of opposed sidewalls have an outer portion defined by the band member, and an inner surface integrally attached to the base.

20. A crate for bottles comprising:  
a floor member;  
a pair of opposed end walls, each including an end band member;

a pair of opposed sidewalls integrally formed with the floor member and the first pair of opposed sidewalls, each sidewall including a side band member defined by an upper edge and lower edge, the lower edge spaced above the floor member by a predetermined distance to define a sidewall nesting area therebelow, the upper and lower edges directed downwardly in the plane

of its respective sidewall to form with an adjacent end band member a corner band portion therebetween, wherein each side band member is matingly received within a corresponding nesting area; and

a corner projection member extending upward from the corner band portion and received within a corresponding opening formed in a corner lower surface when nested below a similar crate.

21. The crate of claim 20, wherein each sidewall further includes a plurality of projection members extending upwardly from the upper edges of the band member and received within corresponding openings formed in the lower edge when nested below a similar crate.

22. The crate of claim 21, wherein the upper surface of the sidewall projections and corner projections are substantially co-planar.

23. The crate of claim 20, wherein at least one of the end walls and sidewalls includes an opening for providing visibility into the crate.

25. The crate of claim 20, wherein the second pairs of opposed sidewalls have a double-wall construction.

26. The crate of claim 20, wherein the side walls and end walls have an outer portion defined by a respective band member, and an inner surface integrally attached to the floor member.

27. The crate of claim 20, wherein the corner projection member is offset inwardly from the corner band portion.

28. A crate for bottles comprising:  
a base having an upper surface; and  
first and second pairs of opposed sidewalls connected to each other to form a unitary wall construction extending from the base, each of the side walls having an inner wall mounted to the

base and an outer wall spaced from the inner wall and disposed above the base upper surface, the outer wall having a lower edge forming a nesting area therebelow for receiving the corresponding sidewalls when in a nesting orientation with a similar crate, the upper edge of adjacent sidewalls directed downwardly to form an upper edge of a corner band portion which is disposed below the plane of the upper edge of the sidewalls.

29. A crate for bottles comprising:

a floor member having a plurality of bottle support areas; and

first and second pairs of opposed sidewalls integrally formed with the floor member, each sidewall including an outer surface defining a band member having an upper edge and a lower edge, the lower edge spaced above the floor member by a predetermined distance to define a sidewall nesting area therebelow, wherein each nesting area matingly receives a corresponding band member of a crate nested subjacent thereto, and each sidewall further including an inner surface having a plurality of elongate members extending inwardly therefrom between adjacent bottle support areas for connecting the inner surface to the floor member.